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No. 80-568

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

CONSOLIDATED RAIL CORPORATION, *et al.*,
Petitioners,

v.

NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTIONS PRESENTED

1. Whether, in disregard of controlling decisions of this Court,* the lower court unlawfully enjoined railroad rate increases where there has been no Commission finding that those rate increases are unlawful, where those rate increases were not before the court on review, and where certain of those rate increases have not even been instituted.

2. Whether the lower court unlawfully prohibited the railroads from maintaining rate increases pending further agency proceedings even though the court made no finding that the rate increases will probably be found unlawful and even though the injunction will irreparably injure the railroads but is not necessary to protect shippers from harm.**

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* *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963); *United States* v. *SCRAP*, 412 U.S. 669 (1973); *Aberdeen & R. R.R.* v. *SCRAP*, 414 U.S. 1035 (1963); *Aberdeen & R. R.R.* v. *SCRAP*, 422 U.S. 289 (1975); *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444 (1979).

** In addition to those parties named in the caption, the other parties to the proceeding below in the Court of Appeals were the principal railroads of the United States listed in Appendix A; the United States and Interstate Commerce Commission; and the following additional private parties: The Aluminum Association; American Paper Institute; Armco, Inc.; Bergstrom Paper Company; Commercial Metals Co.; Fort Howard Paper Company; Frankel Bros. & Co., Inc.; Glass Packaging Institute; Inland Steel Company; Institute of Scrap Iron and Steel; National Steel Corporation; Republic Steel Corporation; RSR Corporation; Southern Paper Traffic Conference; Southwestern Paper Traffic Conference; U.S. Reduction Company; Western Paper Traffic Conference; Wisconsin Paper and Pulp Manufacturers Traffic Association; Youngstown Sheet and Tube Company.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	2
STATUTES INVOLVED	2
STATEMENT OF FACTS	2
A. The Railroad Ratemaking Framework	2
B. Ex Parte No. 319	4
C. The Continuing Rate Adjustment Process	6
D. The Decision and Order Below	8
ARGUMENT	10
I. The Court of Appeals May Not Lawfully Enjoin Railroad Rates Which Have Never Been Found To Be Unlawful by the Commission and Which Are Not Properly Before the Court on Review	11
II. The Court of Appeals May Not Lawfully Enjoin Railroad Rates Without Making Any of the Findings Traditionally Required for Injunctions or Stays	15
CONCLUSION	20

TABLE OF AUTHORITIES

CASES

Aberdeen & R. R.R. v. SCRAP, 414 U.S. 1035 (1973) passim

Aberdeen & R. R.R. v. SCRAP, 422 U.S. 289 (1975) . . i, 3, 13

Arizona Grocery Co. v. Atchison, T. & S.F. Ry., 284 U.S. 370 (1932) 3, 12

Arrow Transp. Co. v. Southern Ry., 372 U.S. 658 (1963) . . . . . passim

AT&T v. FCC, 487 F.2d 865 (2d Cir. 1973) 13

PREVIOUS PAGE WAS BLANK

Table of Authorities Continued

	Page
Doran v. Salem Inn, Inc., 422 U.S. 922 (1975)	16
ICC v. Inland Waterways Corp., 319 U.S. 671 (1943)	12
NARI v. ICC, 8th Cir., No. 79-1898	5
Southern Ry. v. Seaboard Allied Milling Corp., 442 U.S. 444 (1979)	i, 13
Union Electric Co. v. United States, 8th Cir., No. 79-1844, *et al.*, July 16, 1980	13
United States v. SCRAP, 412 U.S. 669 (1973)	passim
ICC Ex Parte Proceedings	
Ex Parte No. 349 (Sub. No. 1)	7
Ex Parte No. 357	7
Ex Parte No. 363	6
Ex Parte No. 368	8, 12
Ex Parte No. 374	8
Ex Parte No. 375	8
Statutes	
Interstate Commerce Act:	
49 U.S.C. § 10704	4
49 U.S.C. § 10707	2, 3, 4, 11, 13
49 U.S.C. § 10707(c)(1)	19
49 U.S.C. § 10731	2, 4
49 U.S.C. § 11701	4
49 U.S.C. § 11705	4, 16
28 U.S.C. § 1254(1)	2
28 U.S.C. § 2342	2, 6, 13
28 U.S.C. § 2344	2, 10, 13

Table of Authorities Continued

Page

MISCELLANEOUS

S. Rep. No. 94, 94-499, 94th Cong., 1st Sess. (1973) ... 5

Hearings Before the Subcommittee on Environment of the Senate Committee on S. 1122, S. 1593, S. 1816, S. 1879, and S. 2753, 93d Cong., 1st Sess. (1973).. 4

93rd ICC Ann. Rep. 116 (1979) 15

Traffic World, Sept. 29, 1980 6

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NATIONAL ASSOCIATION OF RECYCLING INDUSTRIES, INC., *et al.*,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners, the principal Eastern, Western, and Southern railroads of the United States listed in Appendix A ("the railroads"),[1] request certiorari to review, and summary reversal of, the August 15, 1980, order of the United States Court of Appeals for the District of Columbia Circuit enjoining certain past and future railroad rate increases.

OPINIONS BELOW

The August 15, 1980, order of the Court of Appeals, which is not yet officially reported, appears as Ap-

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[1] The appendices are cited "Pet. App. ——."

pendix B. A related earlier decision of the same court filed April 25, 1980, is not yet officially reported and appears as Appendix C. The decision of the Interstate Commerce Commission is reported at 361 I.C.C. 238 and appears as Appendix D.

JURISDICTION

The April 25, 1980, decision of the Court of Appeals which comprises its judgment was subject to a petition for rehearing, and that petition for rehearing was resolved by the August 15, 1980, order of the Court of Appeals.[2] The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Pertinent provisions of the Hobbs Act (28 U.S.C. §§ 2342, 2344) and the Interstate Commerce Act (49 U.S.C. §§ 10707, 10731) appear as Appendix E.[3]

STATEMENT OF FACTS

A. The Railroad Ratemaking Framework

Like almost all other American businesses, the railroads make their own decisions as to how much they

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[2] The August 15, 1980, order, is the principal subject of this petition for certiorari. To the extent that the injunction against railroad rates is deemed to derive also from the April 25, 1980, decision, the railroads seek review of that decision. The time to seek review of that decision was tolled by the petition for rehearing.

[3] Congress has recently passed amendments to the Interstate Commerce Act which, if signed by the President, will alter in limited respects these and other provisions of the Interstate Commerce Act. Pet. App. 7e. None of the amendments affects in any way the lower court's lack of jurisdiction to issue the order in question or the prospective importance of this case.

will charge for their services. Under the Interstate Commerce Act, the Commission's prior approval is not necessary to implement rate changes.[4] The railroads determine what rates should be utilized, file tariffs embodying those rates with the Commission, and on the effective date stated in the tariffs begin to charge the new tariff rates. The Commission may suspend a new tariff filing for up to seven months (or in some cases ten months),[5] but apart from this limited suspension, rates filed by the railroads become effective as carrier-made rates and remain in effect unless and until the Commission finds them unlawful.

Because evaluation of rates is a complex matter and uniformity is essential, one expert body—the ICC—is charged with regulating all interstate railroad ratemaking. Indeed, a cardinal purpose of the Act was to "lodg[e] in the Commission the power theretofore exercised by courts, of determining the reasonableness of a published rate." *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry.*, 284 U.S. 370, 384 (1932) (footnote omitted). Similarly, by conferring in the Commission power to suspend rates, Congress confided in the Commission exclusive authority to determine whether rate changes should be deferred pending their evaluation. *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658, 668 (1963).

Although the rate-setting initiative is left to the railroads, the Act does provide an elaborate system

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[4] See *United States* v. *SCRAP*, 412 U.S. 669, 672 (1973) (*"SCRAP I"*); *Aberdeen & R. R.R.* v. *SCRAP*, 422 U.S. 289, 311 (1975) (*"SCRAP II"*).

[5] 49 U.S.C. § 10707. If the Commission has not concluded its proceeding within that period the rates become effective by operation of law. *Id.*

of remedies to protect shippers. The Commission can determine at any time that a rate is unreasonably high, low or discriminatory. See 49 U.S.C. §§ 10704, 10707, 11701. If it finds that a shipper has been injured by an unlawful rate, it may award reparations. 49 U.S.C. § 11705. By contrast, if a new railroad tariff is prevented from going into effect, the railroad's loss is irreparable.

B. Ex Parte No. 319

For a number of years, the two trade associations representing shippers of recyclable commodities complained that rates for recyclables were unreasonably high and discriminatory.[6] Failing to persuade the Commission that this was so, the recycling industry supported legislation that would have given preferential rate treatment to recyclables as opposed to other traffic and would have seriously impaired the railroads' ability to make rate adjustments on recyclables, even if the rate adjustments were reasonable and non-discriminatory under established criteria.[7] In the past, Congress refused to adopt such proposals but as a compromise, in Section 204 of the 4R Act, it ordered a broad investigation of the rate structure for recyclables to be conducted under existing legal standards of reasonableness and non-discrimination.[8]

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[6] National Association of Recycling Industries, Inc. ("NARI"); Institute of Scrap Iron and Steel.

[7] See, *e.g.*, *Hearings Before the Subcommittee on Environment of the Senate Committee on Commerce on S. 1122, S. 1593, S. 1816, S. 1879, and S. 2753*, 93d Cong., 1st Sess. (1973). Proposed bills would have, for example, required recyclables to be transported at the "lowest possible" lawful rates.

[8] Railroad Revitalization and Regulatory Reform Act of 1976, Section 204, now codified as 49 U.S.C. § 10731. See S. Rep. No.

The Commission undertook the required investigation, styled *Ex Parte No. 319,* and in 1977 at the conclusion of the year-long investigation, the Commission found that the rate structures for almost all recyclables were reasonable and non-discriminatory. 356 I.C.C. 114. On appeal by NARI, the Court of Appeals remanded the case for further reconsideration. *NARI* v. *ICC,* 585 F.2d 522 (D.C. Cir. 1978), *cert. denied,* 440 U.S. 929 (1979). However, the court did not disturb the Commission's environmental impact statement which concluded, after a 200-page discussion, that railroad rates had no significant impact on the level of recycling.[9]

Pursuant to the remand order, the Commission reopened its *Ex Parte No. 319* investigation and received new evidence. It updated the record to reflect cost and rate increases since its initial investigation in 1976. On April 16, 1979, the Commission issued its second decision in *Ex Parte No. 319,* which again found that most recyclables were moving under rate structures which were both reasonable and non-discriminatory. 361 I.C.C. 238 (Pet. App. 1d). However, this time the Commission imposed two new requirements:

1. It required that, for each major category of recyclables, the rates reflect a ratio of revenue to variable cost not in excess of 180 percent, a

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94, 94-499, 94th Cong., 1st Sess. 51 (1973), providing that determinations in the investigation shall be made under "existing rules of ratemaking."

[9] See *Ex Parte No. 319* EIS. A September 1979 supplement reaffirmed this conclusion while conjecturing that technical changes (*e.g.*, in technology) might someday alter this situation.

level the Commission explicitly admitted was lower than it would apply to other commodities. Pet. App. 11d.

2. It required that, for each major category of recyclables (*e.g.*, iron and steel scrap), the ratio of revenue to variable cost not exceed the ratio for the corresponding category of non-recyclable (*e.g.*, iron ore). Pet. App. 7d.[10]

The Commission ordered the railroads to adjust their rate structure accordingly. This time, both the railroads and the recycling industry appealed the Commission's decision pursuant to 28 U.S.C. § 2342, giving rise to the case now presented to this Court. See pp. 8-9, below.

C. The Continuing Rate Adjustment Process

Both before and since the 4R Act and *Ex Parte No. 319,* the railroads have continued to file new tariffs adjusting existing rates as circumstances have warranted. The unusual rate of inflation in the past several years has driven railroad costs up continually. Even with frequent general rate adjustments, the railroad industry's rate of return has declined from an inadequate level to one which is literally precarious.[11]

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[10] For example, if in Eastern territory, iron ore moved at rates generating a ratio of 170 percent of variable cost, in Eastern territory iron and steel scrap rates would be limited to a maximum ratio of 170 percent (unless and until the iron ore rates were raised to a higher ratio). No matter how high the ratio for iron ore, the iron and steel scrap ratio could not exceed 180 percent.

[11] For the latest twelve months ending June 30, 1980, the industry's return on net investment was 2.68 percent (*Traffic World*, Sept. 29, 1980, p. 123), compared with a Commission-determined reasonable level of at least 11 percent. *Ex Parte No. 363*, served January 31, 1980.

In addition to general rate adjustments made annually or more often by the railroads on all commodities, individual adjustments on specific commodities for particular areas or routes are now common practice. For example, sometimes rates are unduly low and need to be raised; and sometimes competitive conditions (*e.g.*, new truck competition) require a reduction. Many such tariff changes are filed every year with the Commission, and often they are not challenged by anyone.

Nothing in the 4R Act suggested that this process of continuing general and specific adjustments should stop, either for recyclables or other commodities, while *Ex Parte No. 319* continued. Any such direction would have been a striking departure from the Act's principle that the railroads are always free to initiate new rates. In a period of unusual inflation, the practical consequences of a rate freeze for any significant category of traffic would be severe for the hard-pressed railroads and unfair to other shippers left to carry the full load of cost increases.

Accordingly, during the period since 1976 through the present, the railroads have continued to adjust all rates, including recyclable rates, through general rate increases and specific adjustments. However, as noted above, the Commission's April 1979 decision established the 180 percent maximum ratio for recyclables and required ratios no greater than those for corresponding non-recyclables. New adjustments have conformed to these guidelines. Some of the general or specific adjustments were challenged and

others were not;[12] but neither the ICC nor any reviewing court found any of the increases unlawful.[13]

D. The Decision and Order Below

On April 25, 1980, the Court of Appeals largely sustained the Commission's April 1979 decision. Pet. App. 1c. However, it remanded on two principal points: (1) it directed the Commission to clarify the basis for selecting a ceiling of 180 percent rather than some other figure; and (2) it asked the Commission to consider whether, in its own discretion, other remedies should be utilized for any discrimination found to exist. Pet. App. 23c. Nothing in the court's opinion directed the railroads to revoke rate increases which had been made in rate increase proceedings while *Ex Parte No. 319* was pending on review.[14]

NARI filed a rehearing petition asking the court to modify its decision. NARI requested the court to revoke various recyclable rate increases made in *other*

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[12] For example, general increases in the last two years have included *Ex Parte No. 349 (Sub No. 1)*, *Ex Parte No. 357*, *Ex Parte No. 368*, *Ex Parte No. 374* and *Ex Parte No. 375*. Specific increases on various routes or commodities in the same period, most of which do not concern recyclables, are too numerous to count.

[13] Certain categories of recyclable traffic have been moving at ratios so low that rates have not covered or have barely covered variable cost and have not even approached fully allocated cost. Given their financial position and ever-rising costs, the railroads—with the ICC's encouragement—have been trying to raise unduly low ratios, whatever the commodity involved.

[14] The only statement even remotely relevant in the court's decision was its directive to the Commission that rate adjustments made in *Ex Parte No. 319* itself, in order to eliminate discrimination, should not be used to raise recyclable rates. Pet. App. 23c.

proceedings subsequent to the ICC's April 1979 decision and to restrict the railroads' ability to increase rates for recyclables in the future (apart from the 180 percent ceiling and non-discrimination restrictions imposed by the Commission's decision). The railroads opposed such modifications as not only unwarranted but, under decisions of this Court, clearly unlawful since the increases in other proceedings had never been found unlawful and were not even before the lower court in this case.

The lower court on August 15, 1980, issued the order now in dispute: nominally it denied NARI's petition but then in substance it granted much of the relief sought by NARI. Pet. App. 1b. Purporting to clarify its decision of April 25, 1980, the court's new order directed that:

> "Pending completion of that effort [the remand proceeding] those rate increases [since the ICC's April 1979 decision] which have not been applied to virgin materials as well as recyclables are revoked." Pet. App. 3b.

The Court of Appeals' order also extends to future increases which have never been filed or have not yet become effective. *Id.* The lower court ignored the decisions of this Court showing that the lower court lacked authority to enjoin changes in railroad rates never found unlawful by the Commission.

None of the recyclable rate increases that would be affected by the lower court's August 15, 1980, order has been found by the Commission or any court to be unreasonably high or discriminatory. The ratios of revenue to variable cost generated by the resulting rates for categories of recyclables are now all below—

usually far below—the 180 percent ceiling established by the Commission; and the recyclable ratios are all below or equal to the ratios for corresponding virgin commodities.

The railroads filed requests for stays and showed that, if the lower court's order became effective, the Eastern railroads alone would suffer irreparable losses of $5,000,000 per year.[15] The preponderance of the Eastern railroads' loss—$3,400,000—would fall upon Conrail, which is already in a serious deficit position. The stay requests have been denied [16] but, in the event the lower court's order is vacated promptly on certiorari, the railroads can significantly reduce the losses which the lower court's order will otherwise inflict.

ARGUMENT

The lower court has enjoined past and future railroad rate increases which have never been declared unlawful by the Commission and were not even properly before the lower court. This action is directly inconsistent with decisions of this Court in *Arrow Transp. Co.* v. *Southern Ry.*, 372 U.S. 658 (1963), and *SCRAP I;* inconsistent with the governing statute which restricts the Court of Appeals to rate cases actually before it (28 U.S.C. § 2344); and inconsistent with the railroads' statutory right to initiate rate

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[15] Affidavit of Gerald Robinson, Vice-Chairman, Traffic Executive Association-Eastern Railroads, filed in this Court.

[16] Order of the Court of Appeals, September 12, 1980, which appears in Appendix F; notation of the Chief Justice, September 25, 1980.

changes in the future. 49 U.S.C. § 10707. The lower court's lack of authority is so clear that this Court should, as it has in a closely similar case, vacate the lower court's order summarily. *Aberdeen & R. R.R.* v. *SCRAP,* 414 U.S. 1035 (1973).

Even if the lower court had authority to enjoin the railroads' rates, which it clearly did not, the order is inconsistent with every precept governing the exercise of equity power. There are no findings whatever that the rates enjoined are likely to be found unlawful in subsequent Commission proceedings. The order will inflict upon the railroads multimillion dollar losses, irreparable in every sense of the word; yet absent an order, shippers would be amply protected by statutory remedies. Judged by all of the established criteria for stays and injunctions, the order cannot stand.

I. The Court of Appeals May Not Lawfully Enjoin Railroad Rates Which Have Never Been Found To Be Unlawful by the Commission and Which Are Not Properly Before the Court on Review.

The rate increases enjoined by the lower court's order have never been found to be unlawful by the Commission and are wholly consistent with the Commission's April 1979 guidelines. None of the increases was before the lower court for review in this case, and the court's order actually sweeps within its ken increases that have not yet even been filed. Under these circumstances the lower court's order enjoining the rate increases is patently unlawful for at least three separate reasons.

First, it is well established by decisions of this Court that the Commission, not the judiciary, deter-

mines the lawfulness of railroad rates.[17] Consonantly, federal courts may not enjoin railroad rates which the Commission has declined to suspend and which it has never found to be unlawful. In *Arrow Transp. Co.* v. *Southern Ry., supra,* 372 U.S. at 668, this Court found that "Congress meant to foreclose a judicial power to interfere with the *timing* of rate changes" by enjoining railroads from collecting rate increases pending a final resolution of their lawfulness. Reaffirming *Arrow,* this Court in the *SCRAP* litigation twice overturned the lower court's attempt to enjoin recyclable rate increases during the course of judicial review.[18]

Second, the Court of Appeals has not only enjoined rate increases contrary to the *Arrow* principle but it has enjoined rate increases which are not even properly before the court. Its injunction extends to (1) rate increases which were never challenged in the Commission and thus were never considered by it,[19] (2) increases on which the Commission has made no final determination, and (3) increases being reviewed or previously reviewed in *other* cases but never held to be unlawful.[20] The Court of Appeals' order plainly

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[17] *Arizona Grocery Co.* v. *Atchison, T. & S.F. Ry., supra,* 284 U.S. at 384 (*quoted* p. 3, above). Accord, *ICC* v. *Inland Waterways Corp.,* 319 U.S. 671, 691 (1943) (the courts do not either "prescribe or approve rates").

[18] *United States* v. *SCRAP, supra,* 412 U.S. at 696; *Aberdeen & R. R.R.* v. *SCRAP, supra,* 414 U.S. at 1035.

[19] Some of the individual rate increases on the recyclables have never been the subject of either a Commission investigation or a petition to review an order following from such an investigation.

[20] In particular, the ICC's disposition of the recyclable rate increases in *Ex Parte No. 368* was appealed to the Eighth Circuit.

violates the governing statute—28 U.S.C. §§ 2342, 2344—which confines the Court of Appeals' authority to adjudicating the validity of a final ICC order properly brought before the court by a timely petition for review: the increases in other proceedings were *not* before the lower court in this case.

Third, the lower court's open-ended order effectively restricts the railroads in filing of tariffs for future rate increases. Such a restriction not only enjoins rates never ruled on by the ICC or before the lower court for review, but it also violates the railroads' statutory right recognized by this Court to "take the initiative in setting rates"[21] and to have new rates become effective and remain in force unless and until suspended by the ICC or found to be unlawful by the agency. 49 U.S.C. § 10707. It is difficult to imagine a court injunction more antithetical to the thrust of the Interstate Commerce Act, and its policy of carrier-initiated rates, than one that restricts the filing of rates in the future.[22]

When in the *SCRAP* litigation the lower court for the second time enjoined recyclable rate increases

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NARI v. *ICC*, No. 79-1898. The Eighth Circuit recently dismissed as premature attacks by various parties, including NARI, on the increases. See *Union Electric Co.* v. *United States*, 8th Cir., No. 79-1844, *et al.*, July 16, 1980.

[21] *Southern Ry.* v. *Seaboard Allied Milling Corp.*, 442 U.S. 444, 458 (1979), *quoting Aberdeen & R. R.R.* v. *SCRAP*, *supra*, 422 U.S. at 311.

[22] In this respect, the lower court's order directly conflicts with the Second Circuit's decision which, in reliance upon *Arrow* and *SCRAP*, struck down an FCC order purporting to preclude telecommunications common carriers from exercising their statutory right to file rate increases in the future. *AT&T* v. *FCC*, 487 F.2d 865 (2nd Cir. 1973).

never found unlawful by the Commission, this Court *summarily* reversed. *Aberdeen & R. R.R.* v. *SCRAP, supra,* 414 U.S. at 1035. The present case is not distinguishable from the original reversal in *SCRAP I* or the summary reversal in the case just cited, except that the present injunction is even more extreme and less justified because it embraces rate increases not properly before the lower court and increases that have not even been filed. If respect for this Court's decisions is to be vindicated, summary reversal is equally appropriate in this case.

The lower court has never clearly stated the reason for its injunction. In the August 15, 1980 order, it suggested that no one could be sure whether the rate increases were lawful until the Commission completed the remand proceeding (Pet. App. 2b), yet this is plainly not a basis for an injunction. See p. 16, below. Then, in denying a stay, the court suggested that the rate increases in other proceedings were inconsistent with its April 25, 1980, decision (Pet. App. 1f), but the assertion is plainly inaccurate.[23] In any event, if the April 25, 1980, decision did intend such a sweeping injunction but failed to articulate it clearly, then the earlier decision would in that respect be equally unlawful and equally subject to review and reversal now (see p. 2, n.2, above).

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[23] The lower court's April 25, 1980, decision contains no language whatever directing the railroads to revoke general increases or specific increases instituted in proceedings other than *Ex Parte No. 319,* and NARI petitioned the Court of Appeals to modify its decision precisely in order to obtain such a directive. The thrust of the April 25, 1980, decision was to order the Commission to reconsider its 180 percent ratio and its remedy for discrimination (see p. 8, above), and neither measure is hindered in any way by allowing existing rates to remain in force until the Commission completes its inquiry.

It is unnecessary to discuss at length the importance of this case. The decision below involves a direct conflict with a series of consistent decisions of this Court in a matter of recurring importance, namely, the jurisdiction of the courts to enjoin rate changes not suspended by the Commission.[24] The lower court's decision directly infringes upon the allocation of responsibility fixed by Congress between the courts and the regulatory agency. Finally, it threatens to set at naught the ratemaking initiative and flexibility conferred on the railroads by the Act, and increasingly relied on by Congress to rescue the railroad system in this country from its present state.[25]

II. The Court of Appeals May Not Lawfully Enjoin Railroad Rates Without Making *Any* of the Findings Traditionally Required for Injunctions or Stays.

The lower court's order requires a roll-back of existing rates and restricts the scope of the railroads' future rate increases on recyclables for an indefinite period, pending the completion of further Commission proceedings in *Ex Parte No. 319*.[26] The effect of the Court's order is analogous to that of a preliminary injunction or stay pending further agency proceedings. Yet the case does not remotely approach one

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[24] Literally thousands of tariff changes are filed every year. See 93rd *ICC Ann. Rep.* 116 (1979).

[25] This emphasis on increased railroad initiative in ratemaking is reflected throughout the 1976 4R Act and will be even more significant if the 1980 amendments become law.

[26] The remand could be prolonged and, undoubtedly, NARI will try to continue the injunction while it seeks review of the Commission's next decision after remand, just as NARI sought review of each previous Commission decision in this proceeding. In other words, the lower court's injunction could last for several years.

in which a preliminary injunction could be granted, since it meets *none* of the requisite requirements for preliminary injunction or interim stay.[27]

With respect to the likelihood of success, there is no showing whatever that NARI will succeed in further proceedings in having the rate increases enjoined by the lower court declared unlawful. The lower court did not even suggest that such a likelihood existed, saying no more than that "railroad rate increases which *may* be discriminatory or unreasonable may not stand." Pet. App. 2b (emphasis added). This is not a finding of a likelihood of success and, on its own terms, it is a bewildering assertion: railroad rate increases which "may" be discriminatory or unreasonable do "stand" unless and until the Commission determines that the rates *are* unlawful, since that is the way that Congress designed the Interstate Commerce Act.[28]

A second requirement for preliminary injunction or interim stay is a showing that absent a stay the party seeking it will suffer irreparable injury, outweighing any injury to the party adversely affected. In this case, shippers cannot show they will suffer *any* irreparable injury. Under the reparations provisions of the Act, a shipper charged unreasonably high or discriminatory rates may recover damages for injury done to it. 49 U.S.C. § 11705. The only irreparable

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[27] The familiar requirements are that there be a likelihood of success in the further proceedings, that the balance of equities be favorable to the party seeking the stay, and that public interest considerations support the stay. See, *e.g.*, *Doran* v. *Salem Inn, Inc.*, 422 U.S. 922, 931 (1975).

[28] *SCRAP I, supra,* 412 U.S. 672-74; *Arrow Transp. Co.* v. *Southern Ry., supra,* 372 U.S. at 662-66.

injury in this case is that caused by *granting* the injunction, *i.e.*, the railroads' irreparable and permanent deprivation of millions of dollars a year, an injury falling with special weight on Conrail, which is already in a deficit position. See p. 10, above. The lower court made no finding that the order was needed to avoid irreparable injury to shippers, nor could it have done so in light of the statutory reparations remedies.

Third, the public interest is ordinarily weighed where agency orders are involved in a stay application. The lower court did not, and could not, find that the rate increases in question adversely affected the movement of recyclables; after the most extensive investigation ever undertaken into the subject, the Commission found in its *Ex Parte No. 319* EIS that at present railroad rate levels have no significant impact on the movement of recyclables. See p. 5 above. The only public interest impact of the lower court's order, therefore, is to deprive the railroad industry of revenues badly needed to modernize rail transportation for all commodities, including recyclables.[29]

In sum, the lower court has here enjoined railroad rates complying with the Commission's April 19, 1979, decision, which was itself largely affirmed by the Court of Appeals. The lower court has enjoined the rate increases which are *prima facie* lawful, with no finding they are likely to be held unlawful on remand, no

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[29] As Mr. Justice White pointed out in his separate opinion in *SCRAP I*, "Failure to maintain this country's railroads even in their present anemic condition will guarantee that recyclable materials will stay where they are—far beyond the reach of recycling plants that as a consequence may not be built at all." 412 U.S. at 724.

finding of irreparable injury to shippers (but certainty that the injunction will significantly injure the railroads), and no finding that the injunction is supported by any known public interest consideration.

Recognizing that a "railroad may depend for its very financial life on an increased rate, and the rate may be perfectly just and reasonable," this Court said that judicial injunctions against such rates can unfairly "deprive the railroad of vitally needed revenues and result in an unjustified windfall to shippers." *SCRAP I, supra,* 412 U.S. at 697. That principle underlies the prohibition on court injunctions against railroad rates, a prohibition which the lower court ignored and which constitutes the primary basis for certiorari and reversal. However, if there is some unknown exception that empowers lower courts to issue such injunctions, nothing could be more urgent than for this Court to delineate and enforce strictly the standards that must be met before such injunctions are issued. In the present case there are no conceivable standards that could justify the injunction in question.

The order in this case is the epitome of an improper restraint. With cursory explanation and no justification whatever, the lower court has enjoined railroad rates representing $5,000,000 or more a year in badly needed railroad revenues. Concern about such ill-advised injunctions may well be one of the reasons why Congress determined in the Interstate Commerce Act "to withdraw from the judiciary any pre-existing power to grant injunction relief" against railroad rates. *Arrow Transp. Co.* v. *Southern Ry., supra,* 372 U.S. 658, 667. In all events, Congress certainly cannot have intended that such injunctions be granted on

standards less rigorous than those governing conventional injunctions.[30]

The lower court's failure to justify its injunction even under conventional standards for preliminary injunctions or stays justifies summary reversal. Even if power to issue such an injunction is assumed, the lower court is clearly not entitled to issue one until the court has made the requisite findings. Where, as here, none of the conventional findings have even been articulated, the case for summary reversal is clear.

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[30] On the contrary, Congress has specifically provided (in 49 U.S.C. § 10707(c)(1)) that the Commission itself, in exercising its explicit power to suspend rates for a limited period, may do so only "if it appears from specific facts shown by the verified complaint of a person that—

(A) without suspension, the proposed rate change will cause substantial injury to the complainant or the party represented by the complainant; and

(B) it is likely that the complaint will prevail on the merits.

(2) The burden is on the complainant to prove the facts required under paragraph (1)(A) and (B) of this subsection."

CONCLUSION

For the reasons stated, certiorari should be granted and the order below should be summarily reversed on the authority of *SCRAP I* and *Aberdeen & R. R.R.* v. *SCRAP, supra,* 414 U.S. at 1035. In the alternative, certiorari should be granted, and the case should be set for briefing and oral argument on an expedited schedule.

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